Supreme Court, U.S.
FILED
APR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88- _____

In The
Supreme Court of the United States
October Term, 1988

RAMON MARTINEZ-VILLAREAL,
Petitioner,

vs.

STATE OF ARIZONA,
Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Does Arizona's standard of 'cruel, heinous and depraved' conduct as an aggravating circumstance provide sufficient guidance to the sentencer to comply with Maynard v. Cartwright and Furman v. Georgia where the Arizona Supreme Court deems it improper to impose death under that circumstance to one who murders his wife to obtain insurance proceeds with which to buy a boat motor and which refuses that circumstance where the perpetrators of a brutal rape-murder celebrate that crime but allows its application to one who kills and later rationalizes his act as a show of manhood?

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Constitutional Provisions

United States Constitution, Eighth Amendment

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Arizona Revised Statutes, Section 13-704

OPINION BELOW

The opinion of the Arizona Supreme Court, denying review of the trial court's decision, is attached hereto as the Appendix.

STATEMENT OF JURISDICTION

The Arizona Supreme Court denied Petitioner's petition for review on February 22nd, 1989. This petition is filed within 60 days from that denial, on or before April 24th, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

On October 14, 1982, James Thomas McGraw and Fernando Estrada-Bavichi were found murdered on the McGraw Ranch in southern Arizona. Each man had been shot once in the chest with a high-powered rifle. Investigators found a spent Remington 7 mm casing and a spent .270 rifle casing. Other .270 casings were also found in the vicinity. Mr. McGraw's truck was stolen after the shooting and later abandoned.

Two distinctive sets of shoeprints were found at the scene and traced by the police to a dry river bed. There, they arrested David Meza Monreal, 17 and Ramon Martinez-Villareal, 38. Following their arrest, Monreal claimed that Martinez-Villareal had killed both men. He

claimed that Martinez-Villareal killed them in order to demonstrate his manhood.

Following his jury trial, Mr. Martniez-Villareal was found guilty of both murders. The trial judge sentenced Mr. Martinez-Villareal to death for both murders. Cited in aggravation were 1) that the murders were committed for pecuniary gain (the theft of the truck) and 2) that the murders had been committed in a depraved manner.

Mr. Martinez-Villareal appealed from imposition of the death penalty and the finding of guilt to the Arizona Supreme Court, which affirmed his conviction and imposition of the death penalty. State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670, cert. denied 474 U.S. 975 (1985). On March 28th, 1986, a Petition for Post-Conviction Relief was filed in the trial court pursuant to Arizona's law. That Petition was denied on September 27th, 1988 and review was sought before the Arizona Supreme Court. The Arizona Supreme Court declined to permit further briefing on the 'heinous, cruel and depraved' aggravating circumstance and denied review of the Post-Conviction Relief proceedings on February 22nd, 1989.

REASON FOR GRANTING THE WRIT

The shortcomings in Arizona's statutory scheme is similar to those found in Oklahoma's law in Maynard v. Cartwright., 108 S.Ct. 1853 (1988). There, as here, efforts were made to elucidate the ambiguous 'especially heinous, atrocious, or cruel' aggravating circumstance. Arizona case law regarding this single statutory aggravating circumstance defies reconciliation. It is apparent that adequate guidance is not

given to the sentencer. In addition, the Ninth Circuit Court of Appeals recently noted that this catch-all provision is now the single most widely cited reason for imposing the death penalty. Adamson v. Ricketts, 865 F.2d 1011, 1031 (9th Cir. 1988).

The statute at issue provides, in part:

A.R.S. 13-703 (E)

In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has erved twenty-five calendar years . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances substantial enough to call for leniency.

F. Aggravating circumstances to be considered shall be tne following: . . .

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

In Maynard v. Cartwright, the Court referred to findings made by the Court of Appeals in concluding that Oklahoma did not provide sufficient guidance to the sentencer to satisfy the requirements of Furman v. Georgia, 408 U. S. 238 (1972). The Court noted the Court of Appeals findings:

Its reading of the cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstnace, the court had 'refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.' 822 F.2d, at 1491. Rather, the Oklahoma court simply reviewed all of the circumstances of the murder

and decided whether the facts made out the aggravating circumstance. *Ibid.*" 108 S.Ct. at 1857. (Emphasis in original).

Likewise, Arizona has made an effort to articulate standards for this aggravating circumstance, but without success. In State v. Gretzler, 135 Ariz. 42, 659 P. 2d 1 (1983), the Arizona Supreme Court identified five factors which would satisfy the heinousness and depravity aspects of that aggravating circumstance:

1. The apparent relishing of the murder by the killer.

2. The infliction of gratuitous violence on the victim.

3. The needless mutilation of the victim.

4. The senselessness of the crime.

5. The helplessness of the victim.

Subsequent decisions of the Arizona Supreme Court, including this one, demonstrate that the captial sentencer remains as unguided as ever. Freakish and irreconcilible applications of that aggravating factor demonstrate just how standardless it is.

In the first place, here, as in Maynard, no Arizona decision has stated which factors are necessary for finding this aggravating circumstance. In many cases, imposition of death under this aggravating circumstance depends upon articulation of factors not mentioned in Gretzler and the uneven application of those factors.

Uneven application of this circumstance is typified by the facts of this case. Here, resort to any articulated standard was abandoned in favor of a general conclusion that a murder as a show of machismo demonstrated "a manifest disregard for the fundamental principles upon which our society is based," 145 Ariz. at 451. Compare that result

with the decision in State v. Madsen, 125 Ariz. 346 at 353, 609 P.2d 1046 (1980) where imposition of the death penalty was reversed though the defendant had used the insurance proceeds from the murder of his wife to buy a motor for his power boat and he later bragged that it was "easy to get money, you just blow someone" and collect the insurance. In State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983) the death penalty was set aside for insufficient evidence of heinousness or depravity. There, following a brutal rape-murder, the perpetrators celebrated by playing the triumphant "We Are The Champions" on a jukebox. In part, that finding was not adequately shown because the sole testimony of that incident was a statement by a co-defendant. 138 Ariz. at 85-86. By contrast, the testimony of Mr. Martinez-Villareal's accomplice that, long after the fact, he rationalized his conduct as evidence of manhood, was sufficient to sustain the finding of this aggravating factor.

Other instances demonstrate the unguided nature of this circumstance in its application. For instance, proof of advanced age, without more, can suffice to show helplessness of the victim, hence heinousness or depravity, under Arizona law. In State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22 (1983), the murder was found to be heinous and depraved because of the victim's advanced age and helplessness. The Court considered her killing to be senseless because her killer could have supposedly "accomplished whatever criminal goals he desired without killing her." 135 Ariz. at 69-70. See, State v. Fisher, 141 Ariz. 229, at 252, 686 P.2d 750 (1984). On the other hand, the crime is also heinous and depraved if the victim is too young, State v. Roscoe, 145 Ariz. 212 at 226,

700 P.2d 1312 (1985). By contrast, in State v. Arias, 131 Ariz. 441, 641 P.2d 1285 (1982) an 81 year old woman was bound, gagged and strangled to death. Her killer was sentenced to a term of life imprisonment. In State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985), a 70 year old robbery victim was bound and beaten severely. His killer then set a fire which killed the old man. That killer recieved a term of life imprisonment.

As the Court reiterated in Maynard v. Cartwright, :

> Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. (Citations omitted). 108 S.Ct. at 1858.

The Arizona statute regarding imposition of death upon a finding of heinousness or depravity is not sufficiently cabined, by its own language or by the guidance given by the Arizona Supreme Court, to meet that mandate. The freakish examples cited above demonstrate that such a finding in this case, as opposed to so many others, results from mere happenstance. That statute, as construed, is improperly vague under the Eighth Amendment because it "fails adequately to inform" sentencers "what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972). " Maynard v. Cartwright, 108 S.Ct. at 1858.

Conclusion

The Petition for Writ of Certiorari should be granted.

Dated this 24th day of April, 1989.

Daniel F. Davis
Attorney for Petitioner

Three copies of the foregoing
mailed this 24th day of April,
1989, to:

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Attorney for Respondent

APPENDIX

(SEAL)
Supreme Court
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STATE OF ARIZONA

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Telephone (602) 255-4536

February 23rd, 1989

Re: STATE OF ARIZONA vs. RAMON MARTINEZ-VILLAREAL
Supreme Court No. CR-88-0405-PC
Santa Cruz County No. 4641-A & 4653-A

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 22, 1989, in regard to the above referenced cause:

ORDERED: Petition for Review = DENIED.

Record on Petition for Post-Conviction Relief returned to Santa Cruz Superior Court this 23rd day of February, 1989, to wit:

Instr and MEs (Combined)
3 Orig. RTs (4/8/88; 4/18/88; 7/12/88)

NOEL K. DESSAINT, Clerk

To:

Hon. Robert K. Corbin, Attorney General
Attn: William J. Schafer III, Esq.
Bruce M. Ferg, Assistant Attorney General (Tucson)
Daniel F. Davis, Esq.
Luis M. Castillo, Jr., Esq.

Ramon Martinez-Villareal
Jose Luis Machado, Santa Cruz County Attorney
Roberto C. Montiel, Presiding Judge, Santa Cruz County Superior Court
Delfina Bauch, Clerk, Santa Cruz County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF SANTA CRUZ

THE STATE OF ARIZONA,	)	
	)	CASE NO. 4641-A & 4653-A
Respondent,	)	
	)	
vs.	)	MINUTE ENTRY ORDER
	)	
RAMON MARTINEZ-VILLAREAL,	)	
	)	
Petitioner.	)	
	)	

The defendant in his Petition for Post-Conviction Relief makes a number of allegations that his trial attorney was ineffective. This Court has reviewed the allegations and finds that the allegations are not supported by any specific examples of such and therefore this Court finds no merit in the allegations.

The other issues raised by the defendant in his petition have either already been reviewed by the Supreme Court of Arizona in this case or have already been resolved in other death penalty cases.

This Court finds that there are no material issues of fact or law which entitles this petitioner in any relief under Rule 32, Arizona Rules of Criminal Procedure.

DATED this 12th day of July, 1988.

ROBERTO C. MONTIEL
Judge of the Superior Court

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Attorneys for Plaintiff
Pima County Computer No. 003544

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF SANTA CRUZ

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	NO. 4641-A
	)	NO. 4653-A
vs.	)	
	)	
RAMON MARTINEZ-VILLAREAL,	)	PROPOSED
	)	MEMORANDUM AND
	)	ORDER
Petitioner.	)	
	)	

The Court having carefully considered all of the pleadings presented with regard to this post-conviction relief proceeding, including the petition filed June 10, 1986, the amended petition dated June 19, 1988, the resonse thereto dated June 29, 1988, the reply dated July 11, 1988, the motion for rehearing dated July 28, 1988, and teh response thereto dated August 5, 1988. It has also considered the arguments presented during the hearing held on July 12, 1988, as well as reviewed the transcripts of the trial and related proceedings. Being thus fully informed, the Court makes the following findings.
1 Ineffective assistance of counsel claims. Vague and conclusory claims of ineffective assistance by petitioner's trial counsel were presented in "Attachment A" to the petition filed on June 10, 1986. Similar allegations were presented in Claims 1(A)-(D) of the amended petition. The allegations are unsupported by affidavits,

citations to the existing record, or offers of proof that would give them any color of validity, or create any material issue of fact or law. The requirements of Arizona Rule of Criminal Procedure 32 not having been met, these claims are dismissed. Rule 32.6 (C); State v. Borbon, 146 Ariz. 392, 706 P.2d 718 (1985); State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982); State v. Gunter, 132 Ariz. 64, 643 P.2d 1034 (Ct. App. 1982).

2, 3. "The abridgment of any other right" and "The existence of newly-discovered material". These are wholly generalized, unsupported claims, which fail to state any claim on which relief could be granted.

4. Requirement to prove mitigating factors. That it is constitutional to impose this burden on a defendant has been repeatedly held by the Arizona Supreme Court. See, e.g. State v. Fulmiante, No. CR-86-0053-AP (Ariz. Sup. Ct., June 16, 1988).

5. Death Penalty required when there is one aggravating circumstance and no mitigating factors. This is a permissible arrangement. Fulmiante, Slip. op. at 45-46.

6. No jury trial on Enmund v. Florida findings. No jury is required. Cabana v. Bullock, 474 U.S. 373, 106 S.Ct. 689, 88L.Ed.2d 704 (1986).

7. Does Arizona have an unconstitutional mandatory death penalty? No — State v. Gillies, 142 Ariz. 564, 568, 691 P.2d 655, 659 (1984), cert. denied, 470 U.S. 1059 (1985).

8. Alleged lack of adequate standards for comparing aggravating and mitigating factors. The statutory scheme is acceptable. Fulmiante, Slip op. at 46.

9. Proportionality review. What the Arizona Supreme Court considers in doing such reviews has been a matter of record at least since State v. Richmond, 114 Ariz. 186, 196, 590 P.2d 41, 51 (1956), cert. denied, 433 U.S. 915 (1977). There is no "right" to such review under the federal constitution. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Petitioner has already received such a review on his direct appeal. State v. Martinez-Villareal, 145 Ariz. 441, 451-452, 702 P.2d 670, 680-681 (1985), cert. denied, 474 U.S. 975.

10. Incomplete scheme for execution. No specifics on what supposedly is missing have been provided, so this allegation does not constitute a "colorable" claim.

11. Discriminatory application of death penalty. The Amended Petition presents no factual support for this allegation. Moreover, it fails to allege that there was a discriminatory intent on the part of either the legislature, in establishing Arizona's death

penalty procedures, or of this Court, in imposing a death sentence on petitioner. Absent such discriminatory intent, there is no basis for any relief on this claim. McClesky v. Kemp, ___U.S. ___, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This claim presents no issue of fact or law.

12. Evidentiary support for "pecuniary gain" aggravating circumstance. This issue was considered by the Arizona Supreme Court on petitioner's direct appeal, and cannot be reconsidered by this Court. (See, 145 Ariz. at 451, 702 P.2d at 680.)

13. Lack of jury finding on "depravity" as a state of mind. There is no right to jury trial on the existence of aggravating factors. Fulmiante, Slip. Op, at 47.

14. "Depravity" finding as inconsistent with precedent. The propriety of this finding has already been upheld by the Arizona Supreme Court, and cannot be reconsidered by this Court. (145 Ariz. at 450-51, 702 P.2d at 679-680.)

15. Constitutionality of "depravity" aggravating circumstnace. The Arizona Supreme Court has specifically held that this aggravating factor, as applied in Arizona, does not violate Godfrey v. Georgia, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). See, State v. Gretzler, 135 Ariz. 42, 50-51, 659 P.2d 1, 9-10 (1983), cert. denied 461 U.S. 971. The decision in Maynard v. Cartwright, 43 Crim.L.Rep. 3053 (U.S., June 6, 1988) merely applies Godfrey v. Georgia, supra, so it does not constitute new law. A Godfrey-type claim could have been raised on the direct appeal, or in petitioner's first Rule 32 petition, but was not, so it is precluded. Arizona Rules of Criminal Procedure 32.2, 32.10.

16. Failure to instruct on second degree murder. The Arizona Supreme Court has already determined that, as a matter of state law, it was correct not to give the second degree murder instruction. (145 Ariz. at 446-447, 702 P.2d at 675-76.) The constitutional claim is precluded by the failure to raise it on direct appeal or in petitioner's first post-conviction relief petition. Arizona Rules of Criminal Procedure 32.2, 32.10.

17. Alleged failure to find aggravating circumstance beyond a reasonable doubt. The Arizona Supreme Court has already concuded that this Court did make the finding by the requisite degree of proof. (145 Ariz. at 450, 702 P.2d at 679.)

18. Lack of jury trial on aggravating and mitigating factors. None is required. Fulmiante, Slip. op. at 47.

19. Compliance with Enmund v. Florida. To the extent that this claim is directed against the general application of Arizona's

death penalty statute, it is wholly unsupported by facts. To the extent that it raises what happened in petitioner's own case, the Arizona Supreme Court has already resolved this issue against him. (145 Ariz. at 449, 702 P.2d at 678.) Neither way can it be grounds for any relief in this Court.

20. Unspecified aggregated errors. Such a generalization cannot possibly support any remedy.

CONCLUSION AND ORDER

The Petition and Amended Petition presented "no material issue of fact or law . . . which would entitle petitioner to relief", so "no purpose would be served by any further proceedings". Arizona Rule of Criminal Proceudre 31.6 (c). They were, therefore, summarily dismissed. Nothing in the Motion for Rehearing creates any doubt of the correctness of that action.

Wherefore, the Motion for Rehearing is denied.

/s/ Roberto C. Montiel
Judge, Superior Court

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-2112

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RAMON MARTINEZ-VILLAREAL, Petitioner,

vs.

THE STATE OF ARIZONA, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

MUST NOT THIS PETITION BE DENIED, BECAUSE THE SOLE ISSUE PRESENTED WAS DISPOSED OF BY THE ARIZONA COURTS ON THE BASIS OF AN INDEPENDENT STATE PROCEDURAL GROUND?

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Reasons for Denying the Petition:

THE SOLE ISSUE RAISED IN THE PETITION HAVING BEEN RESOLVED BY THE ARIZONA COURTS ON THE BASIS OF A STATE PROCEDURAL DEFAULT, NO FEDERAL CLAIM HAS BEEN PRESERVED FOR REVIEW, SO NO QUESTION EXISTS THAT LIES WITHIN THIS COURT'S JURISDICTION, AND THE PETITION MUST BE DENIED.

Conclusion

Appendices:

A. Order filed in the Superior Court of the State of Arizona, in and for the County of Santa Cruz dated April 18, 1986.

B. Minute Entry Order dated May 23, 1986.

C. Amended Petition for Post-Conviction Relief.

D. Minute Entry Order dated July 12, 1988.

E. Proposed Memorandum and Order dated September 27, 1988.

F. Supreme Court of Arizona Order dated February 23, 1989, denying Petition for Review.

TABLE OF CASES AND AUTHORITIES

Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)

Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1042-43 (1989)

Illinois v. Gates, 462 U.S. 213 (1983)

Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)

Richardson v. Johnson, 864 F.2d 1536, 1542 (11th Cir. 1989)

State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670 (1985), cert. denied, 474 U.S. 975

Tacho v. Martinez, 862 F.2d 1376 (9th Cir. 1988)

UNITED STATES CODE

28 § 1257

28 § 1257(3)

ARIZONA REVISED STATUTES

§ 13-703

ARIZONA RULES OF CRIMINAL PROCEDURE

32

32.1

32.2

32.10

OPINIONS BELOW

Petitioner's convictions and sentences were affirmed on direct appeal by the Arizona Supreme Court in State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670 (1985), cert. denied, 474 U.S. 975. Petitioner subsequently filed two different state court petitions for post-conviction relief, pursuant to Arizona Rule of Criminal Procedure 32. Since the Superior Court refused all relief in both instances, and the Arizona Supreme Court denied review by a short-form order (which is reproduced in Appendix F.), there are no additional opinions.

STATUTES AND RULES INVOLVED IN THE CASE

United States Code:

28 U.S.C. § 1257. State courts; appeal; certiorari

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution,

treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Arizona Revised Statutes Annotated:

§ 13-703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances.

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

* * *

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that

there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

Arizona Rules of Criminal Procedure:

Rule 32.1. Scope of remedy

Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief on the ground or grounds that:

a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;

b. The court was without jurisdiction to render judgment or to impose sentence;

c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

d. He is being held in custody after his sentence has expired;

e. Newly-discovered material facts exist, which the court, after considering:

(1) The probability that such facts, if introduced would have changed the verdict, finding or sentence;

(2) The diligence which would have been required to discover and produce the evidence at trial;

(3) The promptness with which the petitioner has commenced a proceeding after discovery of such facts,

may require that the conviction or sentence be vacated;

f. The petitioner's failure to appeal from the judgment, sentence, or both within the prescribed time was without fault on his part; or

g. There has been a significant change in the law applied in the process which led to the petitioner's conviction or sentence, and there are sufficient reasons to allow retroactive application of the changed legal standard.

Rule 32.2. **Preclusion of remedy**

a. **Preclusion.** A petitioner will not be given relief under this rule based upon any ground:

(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;

(3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

b. **Exceptions.** Rule 32.2 shall not apply to claims based on Rules 32.1(d), (e) and (g).

c. **Inference of Waiver.** The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel, that he knowingly, voluntarily and intentionally relinquished the right to do so.

d. **Standard of Proof.** The prosecutor shall plead and prove any ground of preclusion by a preponderance of the evidence; however, the inference of section (c) shall be considered part of the evidence.

Rule 32.10. **Waiver**

Any grounds for post-conviction relief which have been litigated in the proceedings leading to the judgment of conviction shall not be re-litigated in these proceedings. All grounds for relief available to petitioner must be raised by petitioner either in his petition or in the hearing thereon. Any ground not raised will be presumed waived and may not be the basis for subsequent petition unless the court finds there was reasonable ground for omitting the matter in the original petition or hearing. Any matters raised by appeal or other proceedings such as habeas corpus which have been finally disposed of on the merits may not form a basis for relief in this proceeding.

STATEMENT OF THE CASE

Petitioner received sentences of death on each of two murders. Under the Arizona death

penalty statutes, a murderer becomes "death-eligible" only if the sentencer (the trial judge) finds beyond a reasonable doubt the existence of one or more statutorily enumerated "aggravating circumstances"; the "aggravating circumstances" are then weighed against any "mitigating circumstances" that may exist to determine whether death or a life term should be imposed. See Ariz. Rev. Stat. Ann. § 13-703.

In this case two such aggravating circumstances were found by the trial judge to exist: that the murders had been committed for pecuniary gain, and that they had been committed in an especially "depraved" manner. On his direct appeal to the Arizona Supreme Court, petitioner did not attack the pecuniary gain circumstance at all; he did challenge the finding of "depravity", but only to the extent that he argued that the facts of the case did not support the finding -- no constitutional claim of any kind was put forward. See State v. Martinez-Villareal, 145 Ariz. 441, 443 and 449-52, 702

P.2d 670, 672 and 678-81 (1985), cert. denied, 474 U.S. 975.

On March 31, 1986, counsel for petitioner filed in the Superior Court his first petition for post-conviction relief. Although that petition raised a variety of claims about the death sentences imposed on petitioner, again no argument was advanced that the "depravity" aggravating circumstance was too vague or otherwise unconstitutional. The trial court denied relief on strictly procedural grounds. (Appendices A and B hereto.)

A second petition for post-conviction relief was filed on June 10, 1986, after a stay of petitioner's execution was obtained from the local federal District Court. As initially filed, this petition raised only a claim of ineffective assistance of counsel. Not until an amendment to the second petition was filed in June of 1988 was it ever suggested that the "depravity" circumstance was unconstitutionally vague. (See Appendix C. hereto.) The Superior Court again denied

relief, in a rather non-specific order. (Appendix D.) However, in denying petitioner's motion for rehearing, the Superior Court adopted and signed a detailed "Proposed Memorandum And Order" drafted by counsel for the State, which indicated that the vagueness claim was rejected on a state procedural basis -- the claim was precluded by not having been raised in either the direct appeal or the first petition for post-conviction relief. (Appendix E.) Petitioner sought review by the Arizona Supreme Court, but review was denied. (Appendix F.) Petitioner then filed his Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

THE SOLE ISSUE RAISED IN THE PETITION HAVING BEEN RESOLVED BY THE ARIZONA COURTS ON THE BASIS OF A STATE PROCEDURAL DEFAULT, NO FEDERAL CLAIM HAS BEEN PRESERVED FOR REVIEW, SO NO QUESTION EXISTS THAT LIES WITHIN THIS COURT'S JURISDICTION, AND THE PETITION MUST BE DENIED.

It is fundamental that, in cases arising in the state courts, this Court possesses authority to review only "federal" issues,

i.e., claims based on the Constitution, treaties, or statutes of the United States. Illinois v. Gates, 462 U.S. 213 (1983); 28 U.S.C. § 1257(3). This being true, even if "the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). This doctrine precludes review by this Court whether the independent state ground of decision is substantive or procedural in nature. Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1042-43 (1989); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985). Therefore, if "the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar", review by this Court is precluded. Harris v. Reed, 109 S.Ct. at 1043.

The Superior Court specifically stated

that petitioner's claim that the "depravity" aggravating circumstance was unconstitutionally vague was procedurally barred, because it had not been raised either in the direct appeal or in the first petition for post-conviction relief:

> 15. Constitutionality of "depravity" aggravating circumstance. The Arizona Supreme Court has specifically held that this aggravating factor, as applied in Arizona, does not violate Godfrey v. Georgia, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). See State v. Gretzler, 135 Ariz. 42, 50-51, 659 P.2d 1, 9-10 (1983), cert. denied, 461 U.S. 971. The decision in Maynard v. Cartwright, 43 Crim.L.Rep. 3053 (U.S., June 6, 1988), merely applies Godfrey v. Georgia, supra, so it does not constitute new law. A Godfrey-type claim could have been raised on the direct appeal, or in petitioner's first Rule 32 petition, but was not, so it is precluded. Arizona Rules of Criminal Procedure 32.2, 32.10.

(Appendix E, reproduced pages 4-5.)

Where, as here, a lower court in Arizona denies post-conviction relief on purely procedural grounds and the Arizona Supreme Court then denies review without a statement of reasons, it is presumed to have agreed with the procedural ruling. Tacho v. Martinez, 862 F.2d 1376 (9th Cir. 1988).

Hence, regardless of whether the Superior Court or the Arizona Supreme Court is deemed to be the "last state court rendering a judgment" for purposes of Harris v. Reed, it is clear that petitioner has been denied relief solely on independent state procedural grounds, and this Court lacks jurisdiction over the case. Cf. Richardson v. Johnson, 864 F.2d 1536, 1542 (11th Cir. 1989) (claim of error based on Maynard v. Cartwright, ___ U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), properly found not to provide grounds for habeas corpus relief because of procedural default in state courts). Therefore, this Petition must be denied.

CONCLUSION

This Court cannot review state court decisions based on adequate independent state grounds. The only decision in this case held that petitioner's claim about the alleged vagueness of the "depravity" aggravating circumstance was precluded because of a state procedural default. Therefore, there is no

jurisdiction to review this case, and the petition for certiorari must be denied.

RESPECTFULLY SUBMITTED,

ROBERT K. CORBIN
THE ATTORNEY GENERAL

Bruce M. Ferg

BRUCE M. FERG
Assistant Attorney General
Attorneys for Respondent

FILED
'86 APR 18 P2:44
CLERK SUPERIOR COURT
SANTA CRUZ CO.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF SANTA CRUZ

STATE OF ARIZONA Plaintiff,	)	
vs.	)	Case No. 4641-A 4653-A
RAMON MARTINEZ VILLAREAL, Defendant.	)	O R D E R

The Petition for Post-Conviction Relief and the Motion for Stay of Execution filed by the defendant in the above referenced case are both denied.

This court is of the opinion that all the matters raised in the petition for post-conviction relief have already been considered and ruled upon by the Supreme Court of the State of Arizona.

/s/
ROBERTO C. MONTIEL
Judge of the Supreme Court

Copies To: William Rothstein, Esq.
County Attorney

APPENDIX A

ARIZONA SUPERIOR COURT SANTA CRUZ COUNTY

STATE OF ARIZONA
Plaintiff,

vs.

RAMON MARTINEZ VILLAREAL,
Defendant.

No. 4641-A

Minute Entry

O R D E R

Date: May 23, 1986

This being the time set for the hearing on the Motion for Rehearing in the above entitled case; County Attorney, Jose Luis Machado, being present; comes now William Rothstein, Esq., attorney for the Defendant.

The motion is argued by Counsel.

The Court finds that State vs. Jordon does provide that the aggravating circumstances must have been established beyond a reasonable doubt. There is nothing in State vs. Jordan that requires that those magic words be stated by the Court at the time of sentencing. This issue existed at the time that the intial [sic] appeal was effectuated to the Supreme Court, and that issue was not raised to the Supreme Court.

IT IS, THEREFORE, ORDERED that the Motion for Rehearing and the request for Stay of Execution are denied.

/s/
JUDGE OF THE SUPERIOR COURT

Copy to: County Attorney
William Rothstein, Esq.

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FILED
86 JUL 20 P2:26
CLERK SUPERIOR COURT
SANTA CRUZ CO.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF SANTA CRUZ

STATE OF ARIZONA Respondent, vs. RAMON MARTINEZ VILLAREAL, Petitioner.	No. 4641-A 4653-A AMENDED PETITION FOR POST-CONVICTION RELIEF

Petitioner's name is Ramon Martinez Villareal. His Department of Corrections number is 47628. Petitioner is confined in the Arizona State prison in Florence. Petitioner was convicted of two counts of first degree murder and two counts of residential burglary following a jury trial. He was sentenced on May 20, 1983, to a sentence of death by Santa Cruz County Superior Court Judge Roberto C. Montiel.

II

Petitioner is eligible for relief because of:

15. The provision for imposition of the death penalty upon a showing of 'depravity' violated Godfrey v. Georgia, 446 U.S. 420 (1980) and is unconstitutionally vague under Maynard v. Cartwright, ___ U.S. ___ (Supreme Court No. 87-519, 1988).

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF SANTA CRUZ

STATE OF ARIZONA Respondent,	)	'88 JUL 13 P2:38
vs.	)	CASE NO. 4641-A & 4653-A
RAMON MARTINEZ VILLAREAL, Petitioner.	)	MINUTE ENTRY ORDER

The defendant in his Petition for Post-Conviction Relief makes a number of allegations that his trial attorney was ineffective. This Court has reviewed the allegations and finds that the allegations are not supported by any specific examples of such and therefore this Court finds no merit in the allegations.

The other issues raised by defendant in his petition have either already been reviewed by the Supreme Court of Arizona in this case or have already been resolved in other death penalty cases.

This Court finds that there are no material issues of fact or law which entitles this petitioner in any relief under Rule 32, Arizona Rules of Criminal Procedure.

DATED this 12th day of July, 1988.

/s/
ROBERTO C. MONTIEL
Judge of the Superior Court

[PAGE 2]

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7/13/88
Y.S.

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FILED
'88 SEP 27 P1:28
CLERK SUPERIOR COURT
SANTA CRUZ CO.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF SANTA CRUZ

STATE OF ARIZONA, Respondent, vs. RAMON MARTINEZ-VILLAREAL, Petitioner.	NO. 4641-A NO. 4653-A PROPOSED MEMORANDUM AND ORDER

The Court has carefully considered all of the pleadings presented with regard to this post-conviction relief proceeding, including the petition filed June 10, 1986, the amended petition dated June 19, 1988, the response thereto dated June 29, 1988, the reply dated July 11, 1988, the motion for rehearing dated July 28, 1988, and the response thereto dated August 5, 1988. It has also considered the arguments presented during the hearing held on July 12, 1988, as well as reviewed the transcripts of the trial and related

proceedings. Being thus fully informed, the Court makes the following findings.

[PAGE 4]

15. Constitutionality of "depravity" aggravating circumstance. The Arizona Supreme Court has specifically held that this aggravating factor, as applied in Arizona, does not violate Godfrey v. Georgia, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). See State v. Gretzler, 135 Ariz. 42, 50-51, 659 P.2d 1, 9-10 (1983), cert. denied, 461 U.S. 971. The decision in Maynard v. Cartwright, 43 Crim.L.Rep. 3053 (U.S., June 6, 1988), merely applies Godfrey v. Georgia, supra, so it does not constitute new law. A Godfrey-type claim could have been raised on the direct appeal, or in petitioner's first Rule 32 petition, but was not, so it is precluded. Arizona [PAGE 5] Rules of Criminal Procedure 32.2, 32.10.

[PAGE 6]

CONCLUSION AND ORDER

The Petition and Amended Petition presented "no material issue of fact or law

... which would entitle petitioner to relief", so "no purpose would be served by any further proceedings". Arizona Rule of Criminal Procedure 31.6(c). They were, therefore, summarily dismissed. Nothing in the Motion for Rehearing creates any doubt of the correctness of that action.

Wherefore, the Motion for Rehearing is denied.

/s/
JUDGE, SUPERIOR COURT

D 9-27-88
cc: Ferg
Davis
Az. Supreme Court (cert.)

SUPREME COURT

STATE OF ARIZONA

Noel K. Dessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone: (602) 542-4536

February 23, 1989

RE: STATE OF ARIZONA vs. RAMON MARTINEZ-VILLAREAL
Supreme Court No. CR-88-0405-PC
Santa Cruz County No. 4641-A & 4653-A

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 22, 1989, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record on Petition for Post Conviction Relief returned to Santa Cruz Superior Court this 23rd day of February, 1989, to wit:

Instr & MEs (Combined)
3 Orig RTs (4/8/88; 4/18/88/ 7/12/88)

NOEL K. DESSAINT, Clerk

TO:

Hon. Robert K. Corbin, Attorney General
Attn: William J. Schafer III, Esq.
Bruce M. Ferg, Assistant Attorney General (Tucson)
Daniel F. Davis, Esq.
Luis M. Castillo, Jr., Esq.

APPENDIX F

Ramon Martinez-Villareal
Jose Luis Machado, Santa Cruz County Attorney
Robert C. Montiel, Presiding Judge, Santa Cruz County Superior Court
Delfina Bauch, Clerk, Santa Cruz County Superior Court